

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 26**

**M. PAVIA FERNANDEZ, INC.  
D/B/A PAVIA HOSPITAL <sup>1/</sup>**

**Employer**

**Case No. 26-RC-8289  
(formerly 24-RC-8198) <sup>2/</sup>**

**UNIDAD LABORAL DE ENFERMERAS (OS) Y  
EMPLEADOS DE LA SALUD (ULESS)**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds: <sup>3/</sup>

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that M. Fernandez, Inc. d/b/a Pavia Hospital, hereinafter referred to as the Employer, is a Puerto Rico corporation with an office and place of business located in Santurce, Puerto Rico, where it is engaged in the operation of an acute care hospital. During the past 12 months, a representative period, the Employer had gross revenues in excess of \$250,000 and purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the Commonwealth of Puerto Rico. Accordingly, I find the Employer is engaged in

commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner, who I find to be a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: <sup>4/</sup>

#### **Unit B**

Included: All operating room technicians (ORTs), radiological technicians, and respiratory technicians employed by the Employer at its Santurce, Puerto Rico facility.

Excluded: All other employees, guards and supervisors as defined in the Act.

#### **Unit C**

Included: All escorts, sterile supply technicians and nurse auxiliaries employed by the Employer at its Santurce, Puerto Rico facility.

Excluded: All other employees, guards and supervisors as defined in the Act.

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United

States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Unidad Laboral de Enfermeras (os) y de la Salud (ULESS).

## **ELECTION NOTICES**

Your attention is directed to Section 102.30 of the Board's Rules and Regulations, which provides that the Employer must post the Board's official Notice of Election at least three (3) full working days before the day of the election, excluding Saturdays, Sundays, and holidays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

## **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that eligibility lists containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director for Region 24 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The lists must be of sufficiently large type to be clearly legible. I shall, in turn, make the lists available to all parties to the election.

In order to be timely filed, such lists must be received in the Regional Office, Hato Rey, Puerto Rico on or before **October 13, 2001**. No extension of time to file these lists may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The lists may be submitted by facsimile transmission. Since the lists are to be made available to all parties to the election, please furnish a total of **2** copies, unless the lists are submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.). If you have any questions, please contact the Regional Office.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C.

20570-0001. This request must be received by the Board in Washington by **October 20, 2001**.

**DATED** at Memphis, Tennessee this 6<sup>th</sup> day of October, 2001  
/S/

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Ruth Small, Acting Director, Region 26  
National Labor Relations Board

- 1/ The Employer's name appears as amended.
- 2/ The General Counsel issued an Order Transferring Case from Region 24 to Region 26. Pursuant to said Order, to the extent that further proceedings are appropriate to effectuate this Decision, this case will automatically transfer back to Region 24 and will continue as 24-RC-8198, except that Region 26 will retain jurisdiction only with respect to pre-election issues relating to the substance of this Decision.
- 3/ The Employer and the Petitioner filed timely briefs, which have been duly considered.
- 4/ The parties stipulated to the appropriateness of Units B and C. Thus, the sole issue is whether Unit A, all RNs employed at the Employer's Santurce facility, is an appropriate unit or whether the RNs are supervisors within the meaning of Section 2(11) of the Act. The Employer asserts the RNs are statutory supervisors; thus, Unit A is inappropriate. The Petitioner asserts the RNs are not supervisors; thus, Unit A is one of 8 appropriate bargaining units under the Board's rulemaking.

### **FACTS**

The Employer's facility, located in Santurce, Puerto Rico, is an acute care hospital, which specializes in medical and surgical services for adult patients. It has approximately 20 departments, including cardiovascular institute, obstetrical department, nurse delivery room, operating room, laboratories, imaging center, social

work department, physical therapy and respiratory therapy. The facility has approximately 175 beds. The nursing executive is Olga Rivera. There are two assistant nursing directors, Lyzette Estrada and Emily Perez. Each of the three shifts, 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m., has a general supervisor. Each of the departments has at least one supervisor.<sup>1</sup> There are approximately 26 department supervisors. The department supervisors work for 8 hours during the day, Monday through Friday. Thus, during the weekends, evenings and early morning hours, the department supervisors are not present and RNs report directly to the general supervisor.

The Employer employs approximately 140 RNs, 75 to 80 LPNs, 12 ward clerks (also referred to as secretaries), 9 escorts, 8 auxiliary nurses (aides) and an unknown number of operating room technicians, radiological technicians, respiratory technicians and sterile supply technicians.

The Employer asserts the RNs are statutory supervisors because they have the authority to effectively recommend discipline and wage increases and responsibly direct the work of LPNs, escorts, ward clerks, operating room technicians and nurse auxiliaries. The Employer concedes the RNs are not involved in the hiring process or in representing the Employer in the grievance/arbitration procedure.

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<sup>1</sup> Although the parties did not stipulate to the statutory supervisory status of anyone, the record evidence establishes that the nursing director, assistant nursing directors, general supervisors and department supervisors are supervisors within the meaning of Section 2 (11) of the Act because of their authority to

The Employer introduced documents, which it asserts demonstrate the RNs effectively recommend the discipline of employees.<sup>2</sup> On the other hand, the Petitioner argues these documents are merely incident reports, in which no discipline is recommended and any discipline issued is after an independent investigation by the department supervisor.

The first incident occurred in 1997 wherein RNs Martza Santiago and Luisa Garcia directed operating room technician Carmen Reyes to stay after shift and finish a task in the cardiovascular operating room and she refused to do so. Thereafter, Santiago and Garcia wrote a report to department supervisor Eileen Graniela, who issued a written admonishment to Reyes. On another occasion, RN Garcia reported that Reyes had a "negative attitude" during a operating room procedure and thereafter supervisor Graniela gave Reyes "an interview" (similar to a verbal warning). A third occasion concerning Reyes was when she refused Santiago's instruction to count instruments and RN Santiago reported this to supervisor Graniela, who issued a written warning to Reyes.

RN Enid Gonzalez wrote an incident report concerning RN Carmen Rodriquez about her getting upset when Gonzalez assigned her a task in the operating room. Thereafter, supervisor Graniela met with Rodriquez and told her that she must follow instructions. On another occasion, Rodriquez was told by Santiago to prepare a table for surgery and Rodriquez switched those duties with another employee. Graniela gave Rodriquez a verbal reprimand.

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hire, discipline, evaluate or effectively recommend such and their ability to adjust grievances under the collective bargaining agreement covering the LPNs.

<sup>2</sup> The Employer asserts these are merely examples.

Yahara Ortiz, RN, wrote an incident report concerning LPN Melendez refusing to comply with a request for “blue paps” to be given to a patient’s relative and thereafter supervisor Brenda Cruz gave a verbal reprimand to Melendez. RN Maria de los Angeles Cruz drafted an incident report concerning LPN Mildred Rivera refusing to follow Rivera’s order to take the vital signs of a patient. Thereafter, Rivera was suspended without pay. LPN Rivera was also the subject of reports from RN Alba Olmedo which led to an “interview” and written admonishment from assistant director Perez.

On one occasion, RNs recommended the ORTs be given a wage increase and thereafter they were given a raise. Rivera conceded this was the only such recommendation in her 4-year tenure and the RNs have not been informed that they have this authority.

The Employer asserts RNs, use their independent judgment, to direct the work of LPNs, ward clerks, ORTs and escorts by giving work assignments. Rivera testified the RNs divide the patients between the LPNs using their professional judgment on the competency of the nonprofessional employees and the priorities of the patients. Rivera testified an example is when a number of patients need to be bathed, the RN must decide in what order those patients are bathed based upon her clinical experience and education. Thereafter, the RN decides which of the nonprofessional personnel will carry out these duties. The incident reports, written by RNs, support Rivera’s testimony that RNs order non-professional employees to perform various tasks. Furthermore, the verbal reprimand issued to Melendez stated that his failure to follow RN Ortiz’s instruction was “an act of insubordination”.

Rivera testified that RNs direct the action plan wherein the patient's condition and needs are assessed and then the RNs direct certain personnel perform the tasks. One example is when an RN orders an LPN to move a certain patient. Another situation occurs when the RN must decide whether a patient in critical condition should receive treatment before a patient in stable condition. A third situation occurs when a patient has cardiac arrest without a physician present, then the RN orders employees to perform a variety of tasks. Rivera testified that although there are guidelines for these situations, an RN could use her independent judgment to determine what to do. A final example offered by Rivera is that an RN can order an ORT to stop a procedure if contamination occurs and start again after cleanup.

The job descriptions state an RN "supervises non-professional personnel under his/her responsibility" and "supervises the care provided by the practical nurse and/or support personnel." Furthermore, they state an RN:

- Distributes the tasks
- Directs and participates in the change of shift meeting
- Coordinates the care to be offered to the patient by the practical nurse assigned to her area
- Participates in the process of orientation and education of new employees
- Participates in the non-professional employee's evaluation
- Sets priorities

The Employer introduced assignment sheets signed by an RN, not a department supervisor, showing RNs assigning tasks and patients to LPNs. Rivera stated RNs perform this duty in the absence of a department supervisor. Since department supervisors are only present for 40 hours a week out of 168 hours a week (24 x 7), RNs regularly make assignments. RNs Ramirez and Carvasquillo denied that RNs prepare assignment sheets but did not offer any explanation concerning the Employer's exhibits,



which reflected they did so. The Petitioner introduced biweekly work assignments (timesheets), which were prepared by either the department supervisor or the general supervisor, not an RN.

At the end of each shift, the RN fills out a report listing the condition of patients, their needs and problems. According to the Employer, this document acts as the assignment sheet for the next shift's employees.

Concerning overtime, Rivera testified an RN can ask an employee to remain at work after his shift and finish his job assignments. If the employee is in the operating room, then the RN can order him to do so. Ramirez and Carvasquillo testified they do not have the authority to assign overtime to employees.

Concerning absences, Rivera testified that when an employee is absent, the employee calls the department supervisor or general supervisor, not the RN. Carvasquillo testified RNs are not authorized to locate a substitute for an absent employee. Furthermore, Rivera testified only a department supervisor or general supervisor can shift personnel from one department to another or one floor to another. Rivera also testified RNs have the authority to order personnel for additional training but Ramirez and Carvasquillo denied that RNs have such authority.

The Petitioner cites to differences in wages and working conditions between the department supervisors and RNs as evidence of the RNs' non-supervisory status. Specifically, department supervisors are paid by salary, between \$1650 and \$2500 a month. RNs are hourly paid employees, whose wages vary between \$1200 and \$1550 a month. Department supervisors do not punch in and out on the time clock and are eligible for compensatory time, rather than overtime. RNs as well as LPNs and other

employees punch a time clock and are eligible for overtime. Department supervisors work 8-hour shifts, which begin between 7:00 and 10:00 a.m. and end between 3:00 and 6:00 p.m. Department supervisors are the only individuals who have authority to make corrections on timesheets. RNs are eligible for a bonus for perfect attendance while department supervisors are not. Department supervisors are not assigned to work weekends or holidays while RNs are assigned to both. Department supervisors have access to employee personnel files while RNs do not have such access. Department supervisors take a course in supervision and management while RNs do not. Department supervisors attend supervisory meetings and also conduct meetings with employees. RNs do not attend such meetings nor do they conduct meetings with employees.<sup>3</sup>

### **ANALYSIS**

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. **NLRB v. Kentucky River Community Care**, 121 S.Ct. 1861 (2001). Section 2(11) of the Act defines a supervisor as one, who possesses "authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to establish supervisory status, provided that such authority is exercised in the employer's

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<sup>3</sup> The Employer asserted that RN Ramirez's offer to provide instruction on a medical procedure was evidence of supervisory status. Ramirez testified he was one of the few employees who knew this

interest, and requires independent judgment in a manner, which is more than routine or clerical. **Harborside Healthcare, Inc.**, 330 NLRB No. 191 (2000).

In **NLRB v. Kentucky River Community Care**, *supra*, the Supreme Court held that the RNs' use of independent judgment in responsibly directing the work of other non-professional employees, even if in so doing they were utilizing their professional and technical judgment, required a finding of Section 2(11) supervisory status. The Supreme Court rejected the Board's analysis that this was contrary to Section 2(12) of the Act, which defines a professional employee as a protected employee, and would cause most professional employees to be found as statutory supervisors. The Supreme Court stated it was bound to the express language of Section 2(11) of the Act.

Using this analysis, the Employer has provided substantial record evidence that the RNs responsibly direct employees using their independent judgment. Specifically, the Employer introduced assignment sheets reflecting RNs assigning tasks and patients to LPNs. Other documents showed RNs had ordered or directed LPNs and/or ORTs to perform certain tasks. In making these assignments and orders, RNs utilized their independent judgment. The RNs' job descriptions discuss determining priorities, making assignments and distributing tasks to non-professional employees. Furthermore, Rivera testified to a number of examples where RNs decided what tasks needed to be performed, in what priority and what employee should perform each of the tasks. Rivera also stated RNs determine which LPNs are assigned to which patients. The Employer's exhibits support this testimony. Although RNs Ramirez and Carvasquillo minimize their authority, they did not deny the assignment of tasks to non-professional employees.

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procedure and he merely offered to educate others.

As for their authority to effectively recommend the discipline of employees, a review of the incident reports drafted by the RNs does not show any of them recommending any disciplinary action be taken. Instead, the exhibits reflect the RNs reporting an incident without any discussion of discipline. RN Ramirez testified that the RNs do not recommend the discipline of other employees; rather, if they observe a rule being broken, then they write a report and give it to their supervisor. Thereafter, the supervisor investigates the matter by asking what occurred and then the supervisor decides on what, if any, discipline will be issued. Ramirez stated he would write a report if he witnessed an incident with another RN or even a visitor. Thus, the incident reports do not support a finding of supervisory status. See **Loyalhanna Care Center**, 332 NLRB No. 86 (2000), wherein the Board found an individual's written description of the facts of an incident without a recommendation of discipline does not prove supervisory status.

Concerning the recommendation for a wage increase, this appears to be an isolated incident. Rivera conceded that the RNs have never been told they have this authority. As for the RNs' authority to order a non-professional to work overtime if they are in the operating room, this does not utilize independent judgment. These instances are insufficient to establish them as statutory supervisors. See **Lincoln Park Nursing Home**, 318 NLRB 1160 (1995); **Brown & Root, Inc.**, 314 NLRB 19 (1994).

The RN's job description, which states they participate in non-professional's evaluations and conduct new employee orientations, without any record evidence that this occurs and the extent of their participation is insufficient to establish Section 2(11) status.

Since it only takes one indicia to establish supervisory status, the finding that RNs responsibly direct the work of employees using independent judgment is sufficient to find the RNs are supervisors within the meaning of the Act. **NLRB v. Kentucky River Community Care**. Thus, I find Unit A is not an appropriate unit.

There are approximately 29 employees in Unit C and an unknown number of employees in Unit B.

### **ORDER**

**IT IS HEREBY ORDERED** that Unit A of the petition is dismissed based upon my finding that the RNs are supervisors within the meaning of Section 2(11) of the Act.

### **CLASSIFICATION INDEX**

177-8520-0800  
177-8560-5000  
177-8560-8000